United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1520

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. MARTIN SOSTRE,

Petitioner-Appellant,

-against-

FRANK M. FESTA, Superintendent of Erie County Jail; and ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Respondents-Appellees.

Appeal from United States District Court
Western District of New York

BRIEF FOR PETITIONER-APPELLANT

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Questions Presented

1. Was it clear error for the court below to base its finding that a witness was not candid upon documentary and other evidence which upon its face does not support the court's findings?

2. May perjury by the major witness in a state criminal case, if the defendant is not represented by counsel, constitute a denial of due process of law?

3. May perjury by an informer employed by the police constitute a denial of due process of law in a state criminal case?

Preliminary Statement

This is an appeal from the decision and order of the Western District of New York, Honorable John T. Curtin, dated March 15, 1974 (Docket No. Civil 1972-237), denying a petition for a writ of habeas corpus pursuant to Title 28 U.S.C. §2254, reported at 373 F. Supp. 133.

Statement of Facts

Martin Sostre, a political radical with a criminal record chiefly relating to drugs (T. 51-52*), was the proprietor of the Afro-Asian Bookstore at 1412 Jefferson Ave-

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* The transcript of proceedings in this matter is referred to in the form "T. ".

nue in the City of Buffalo from about January 1965 to the middle of July 1967. The bookstore, located in the black ghetto of the city, featured books of a political nature -- third world literature, as the Petitioner himself described it (T. 44) -- and was intended by Mr. Sostre to function as a "community center" (T. 44, 46). Mr. Sostre was sometimes asked informally to watch over property (or even small children)(T. 46) and at one time Arto Williams, whom Sostre knew as an addict from the neighborhood, asked him to keep a suit for a short time (T. 35, 46).

The size and general physical dimensions of the Afro-Asian Bookstore are depicted in the photographs, Petitioner's Exhibits 3 and 4 (T. 136-137, 152). As a result of fires during the riots in Buffalo in the spring of 1967, all the windows in the storefront were boarded up (T. 44, 174, 216), including those which slant in from the street, and the panel of the door itself.

Early in the morning of July 15, 1967, Martin Sostre was arrested in his bookstore, together with his co-worker Geraldine Robinson, and was charged and subsequently indicted

for sale of heroin, possession and felonious assault (Erie County Indictment No. 33,508 A-B, 1967). The police made great claims for the arrest of Mr. Sostre, attributing to him a major role in the riots of the spring. (See testimony of Frank Felicetta, former Police Commissioner of Buffalo, Hearings of the Committee on Un-American Activities of the House of Representatives, 90th Congress, 2nd Session, Part V [Buffalo], pp. 2017 et seq.)

Mr. Sostre was tried in March 1968 in Erie County Court, without counsel, was found guilty of those crimes and of contempt of court, and sentenced to consecutive terms totalling from 30 to 41 years. Of these sentences, the largest portion, 25 to 30 years, was imposed as a penalty for the conviction on the sale of heroin.* For that charge, the chief witness was Arto Williams, who has recanted his testimony in the present proceeding and now states that he lied at the 1968 trial. Mr. Sostre declined to cross-examine Arto

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* Mr. Sostre's conviction was on appeal at the time of the hearing of this petition. The Appellate Division, Fourth Department, made the sentences concurrent, so that the sentences now total 25-30 years. ___A.D.2d ___. A judge of the Court of Appeals of New York denied leave to appeal.

Williams at his trial, as he did all other witnesses (T. 43), upon the ground that the proceeding was a "frame-up" (MST 40-43*).

After Mr. Sostre's trial, Arto Williams made his way to California, where he eventually was to join a "therapeutic group for rehabilitation of drug addicts" called Tuum Est (T. 38). The history of the present proceeding begins at that juncture, when Arto Williams decided to tell the group that he had lied about the sale of the drugs by Martin Sostre (T. 38-39), and after more discussion, to write a letter to Judge Motley. From the time he first made that confession he has never withdrawn his recantation. In April of 1971, Arto Williams gave an affidavit to one of Mr. Sostre's attorneys (T. 39) and the court below has told us the next few steps: (Opinion pp. 3-4)

> Because Williams resided in California and refused to voluntarily come to New York State, and because the state court was without the power to obtain his attendance by subpoena or order, Sostre was unable to secure the attendance of

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* Reference to the transcript in People of the State of New York v. Martin Sostre, Respondents' Exhibit 2 herein, are in the form "MST. ".

> Williams at a hearing on his coram nobis application. Thus, based on Sostre's inability to produce Williams, the application for a writ of error coram nobis was denied on March 30, 1972. On that same day, petitioner filed this application for a writ of habeas corpus. Petitioner has not appealed the dismissal of the state coram nobis application, but counsel have stipulated that the absence of any provision under state law to secure the attendance of Williams as a witness in the state court proceeding would make any such appeal futile.

Conversely, there was a procedure under federal law for bringing Mr. Williams to a federal district in the State of New York, which was used in this case. To quote the opinion below again: (Opinion pp. 4-5)

> In May of 1973, Williams was located in custody* in California and an aplication was made by petitioner for a writ of habeas corpus ad testificandum. The writ was granted and, through the cooperation of the United States Attorney and the United States marshal, Williams was transported from California to Buffalo, New York. After also ordering Sostre's appearance, a hearing was held in this court on May 29 and May 30, 1973. At the hearing the court heard testimony from Arto Williams, Martin Sostre and various police officers who participated in the investigation and arrest. The court received a transcript of petitioner's Erie County trial and

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* The record discloses that Mr. Williams had been sent back to prison long after his recantation.

> various exhibits.* These exhibits consisted of photographs of the Martin Sostre bookstore where the alleged sale occurred, and a copy of the affidavit of State Trooper Louis Steverson upon which the application for a search warrant was based. By stipulation of counsel, the court considered exhibits A through J, which are annexed to a notice of motion dated July 18, 1973. These exhibits set forth the details of Arto Williams' criminal record after he left the Buffalo area for California.

In his testimony in this proceeding, Arto Williams developed the facts leading up to Mr. Sostre's arrest. Mr. Williams testified that he was arrested in Buffalo in June, 1967 for a felony charge, at a time when he already had a felony record (T. 26.) He wrote to the Buffalo Police Department, a letter the exact contents of which he cannot recall (T. 119), and which a subpoena failed to produce (T. 10), but which apparently sought to make him an informer. Alvin Gristmacher, then an officer with the Buffalo Police Department, came to see Williams in jail. Williams' account of the conversation was (T. 27-28):

> "He asked me did I know anyone selling drugs in the Buffalo area. I told him I did. I named a few people off to him and he didn't seem interested in those. He mentioned Martin Sostre and asked me was I familiar

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*Petitioner's counsel also submitted to the Court below the record of the trial of Geraldine Robinson, Mr. Sostre's companion, a public record on file at the Appellate Division, Fourth Department. People v. Geraldine Robinson, Erie Co. Indictment #33508-A.

> with him and I said 'Yes, I am', and he said, 'Do you know whether he is selling drugs', something to that effect, you know, something like that.
>
> "...he asked me did I know Martin Sostre was selling drugs and I thought about it for a while and I said, 'Yes', and he said, 'Well, we are very interested in Sostre because we believe that he was the cause of the riot at the time in '67'."

Arto Williams knew Martin Sostre from his bookstore, and had once asked Sostre to keep a suit for him. While he had never bought drugs from Sostre, Williams fell in with the idea and agreed to "cooperate being an informant" (T. 28-30) in order to get out of jail. Williams' letter of September 13, 1970, apparently written to his California probation officer, partly corroborated this account (Exhibit J to Douglas Cream Affidavit of 7/18/73.)

About a week later, Officer Gristmacher returned with Michael Amico, then chief of the narcotics division. A similar conversation was held, and neither Amico nor Gristmacher ever mentioned anyone besides Martin Sostre (T. 128-129.) Amico tried to have Williams released immediately. He was released on his own recognizance the next day (T. 30), July 14, 1967, and was promptly conducted to police headquarters where he was thenceforth "employed" as an informant (T. 31; a similar phrase

was used at MST. 33 and at Geraldine Robinson's trial, GRT. 208*.) There Officer Gristmacher gave Mr. Williams money and told him to meet him again at nine that evening. Mr. Williams promptly bought some heroin, using part of it and keeping another portion (T. 32, 92), and used other drugs later (T. 93.) He was still "high" when he kept his appointment with Officer Gristmacher (T. 123-124), (he had obtained a second shot of heroin from a friend early that evening [T. 93]), and for the entire evening. He was taken to police headquarters, hiding the remaining drugs under the seat of the car (T. 33, 96.) There he was introduced to Louis Steverson, a plainclothesman from the state police. Mr. Williams was searched by Officer Gristmacher in the presence of Steverson (T. 33, 99-100), whereupon all three drove around for about an hour, stopping to get a warrant from a judge (T. 101.) They then went to a point near Mr. Sostre's bookstore, and Williams and Steverson got out and walked to it. Once in the store, Arto Williams gave Martin Sostre a "high sign", which Sostre himself described as a jerk of Williams' thumb and a cut of his eyes toward the other man (T. 48), and so Sostre asked the plainclothesmen to leave. He did so, but stood outside the store looking through

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*References to the trial transcript of People v. Geraldine Robinson, Erie Co. Indictment No. 33508A, of which a copy is supplied the Court, are in the form "GRT. _____."

the open door. Williams then asked Martin Sostre to keep fifteen dollars for him, which, as Sostre testified, was not a surprising request from an addict at that bookstore (T. 48-49). Sostre took the money, Williams surreptitiously put his hand up to his shirt pocket (T. 113), and left the store, ultimately giving the remaining part of the drugs he had bought earlier in the day to Alvin Gristmacher for evidence.

Following the arrest, and up to and after the trial of Martin Sostre, Arto Williams continued to work as a police informer. He worked on at least two cases (T. 129-131, 140, 141-142), and received money from Alvin Gristmacher (T. 131). Mr. Williams testified that he received special consideration from the courts in two cases (T. 37) following the Sostre trial.

Mr. Williams testified that he decided to recant in 1971 when he was in the Tuum Est program on the west coast after establishing to the satisfaction of its director that he was telling the truth (T. 38, 39, 81). The fears expressed in his letter of September 13, 1970 indicate that his false testimony had been torturing his conscience for some months before that.

Upon cross-examination, Mr. Williams testified that he had been convicted of selling "baby aspirin" as a drug in

California "in '69 or '70" and put on probation, and that it was for the violation of that probation that he was in prison at the time he was transported pursuant to the writ of habeas corpus ad testificandum in the present proceeding (T. 83-84). He admitted also to an arrest in December 1972 (T. 86). This testimony about his criminal record was to be elucidated further by documents from California later introduced by the State.

The testimony of Respondents' witnesses in this proceeding differs in some matters from that of Arto Williams with relation to the charge of selling heroin, but not in the basic outline of the transaction. The testimony of Peter Notaro, an Assistant District Attorney, is consistent with the testimony of Arto Williams in this proceeding, as well as Williams' letter of September 13, 1970, about his motives for going to California (T. 159, 76-80). Williams testified that he did not feel "safe" in Buffalo, and his parents were worried. He stressed, however, under rigorous cross-examination, that neither he nor his family had ever been threatened, nor had he ever "heard of any threats on the street" (T. 79). Mr. Notaro testified that he would recommend a perjury prosecution against Mr. Williams for his testimony in this proceeding. (T. 162).

State Trooper Thomas Constantine testified to finding glassine envelopes in a search following the alleged sale

(T. 182 et seq.), which was beside the point in the present proceeding. State Trooper John Steinmetz testified that he had been assigned to surveillance of 1412 Jefferson Avenue by Captain Henry Williams of the State Police some four or five days before the arrest. He observed the transaction through the open doorway of the store from the second floor across the street (the same vantage point as Joel Sucher, the photographer who testified in this proceeding [T. 60-62]), and admitted that he could not see the "details." (T. 170).

State Trooper Louis Steverson testified in somewhat more detail. He disagreed with Arto Williams about the seating of the three persons in Alvin Gristmacher's automobile, placing himself in the back seat, and Williams in the right front (compare T. 200 with T. 101). Trooper Steverson had been assigned to the case by Captain Henry Williams the day before the arrest, and the Buffalo police had told him Arto Williams would "make the buy"; Officer Steverson "expected" to see a buy (T. 210). He testified that he did see one, including the actual passing of a glassine envelope. He nevertheless placed himself to left of the open door to the bookstore, consistent with Officer Steinmetz' testimony (T. 175-176, 203, 216). The store counter at which the transaction took place was also on

the left side of the store, the transaction occurred at least eighteen feet away from Officer Steverson (T. 216; cf. T. 35), and, finally, his own nearly contemporaneous affidavit contained no mention of the alleged "glassine envelope." (T. 222, Petitioner's Exhibit 5.)

Some weeks after the testimony was closed, and Williams returned to California, the Attorney General applied to the District Court to introduce documents from California authorities. These consisted of criminal records of Arto Williams (Exhibits A through H to affidavit of Douglas Cream of 7/18/73), a copy of his original 1971 affidavit of recantation (Exhibit I, Ibid.) and a copy of a letter he had written apparently to a probation officer (Exhibit J, Ibid.) in September, 1970. They were admitted in evidence.

The criminal records showed that Mr. Williams had been arrested in November 1969 for selling a substance "in lieu of" LSD (Williams had identified the substance as baby aspirin) (Exhibits A-C). The records revealed two further arrests, in September (Exhibit D) and December (Exhibit E) 1972. (Williams said he had been arrested in December 1972).

For the latter two arrests, Mr. Williams apparently went to jail after pleading guilty to a misdemeanor on January 10, 1973, for 60 days; the records do not disclose why Mr. Williams

was in jail in May, 1973 when he was brought to the Western District of New York, but it is to be supposed that it was for violating probation. In his affidavit of July 18, 1973, Assistant Attorney General Cream implied that Williams swore falsely by having said he was in jail at the time for a violation of probation upon his1969 conviction, because of a failure to report. In fact, the California records submitted show nothing about the precise violation of probation with which Mr. Williams had been charged.

The Assistant Attorney General argued further in his affidavit that Mr. Williams lied in saying that he had not been arrested on "felony charges" after his 1971 affidavit (Cream Affidavit, 7/18/73, Para. 12) even though the only "felony charge" Mr. Williams was asked about was the 1969 charge for selling something "in lieu of LSD." That, of course, had occurred long before Mr. Williams made his recantation.

Mr. Williams' letter to the probation officer, Mr. Barron, (Exhibit J) expressed a fear of revenge from the petitioner. It is consistent with Mr. Williams' testimony at the hearing in this proceeding that he at one time feared for his life and that his parents were "worried." Neither in the letter nor in the transcript does Mr. Williams point to any specific

threat, and he in fact stated at the hearing that he was not threatened (T. 79-80). Mr. Sostre, it may be noted, has been in jail or prison continuously since 1967, unable to make bail either before or after his conviction.

The introduction of Arto Williams' original recantation affidavit of May, 1971 only underscores the fact that Mr. Williams had stuck to his story for two years. In introducing these documents, and thus reopening the proceedings, the state did not introduce any evidence to refute directly any of Mr. Williams' allegations. Officers Gristmacher and Amico were not called; no attempt was made to show that Mr. Williams had not been interviewed by them, had not been released from jail the very day he went to Mr. Sostre's store, or that he had not received favorable treatment upon his pending prosecutions in Erie County.*

On March 15, 1974, Judge Curtin issued his opinion. He relied on this Court's opinion in United States ex rel. Rice v. Vincent, 491 F.2d 1326 (2d Cir. 1974) holding that he was not "reasonably well satisfied that the testimony given by Arto Williams at petitioner's trial was false." (Opinion, p. 15).

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*Evidence to corroborate the fact that Mr. Williams did receive probation in Erie County in 1968 was introduced. (Exhibit to Chevigny affidavit of July 23, 1973).

The court failed to decide the further issue whether, if he believed Arto Williams' recantation, the fact of his previous perjury would have constituted a denial of due process of law to Mr. Sostre.

Judge Curtin included in his opinion and order a certificate of probable cause and permission to proceed in forma pauperis (Opinion, p. 23); this appeal was taken.

ARGUMENT

Point I. THE OPINION OF THE COURT BELOW CONCERNING THE RECANTATION, BEING BASED ON ERRONEOUS FACTUAL ASSUMPTIONS, IS CLEARLY ERRONEOUS

A. Applicable Law

This Court has accepted the standards established in Larrison v. United States, 24 F.2d 82, 87-88 (7th Circuit, 1928), as most recently reiterated in United States ex rel. Rice v. Vincent, 491 F.2d 1326, 1331 (2d Circuit, 1974):

> [A] new trial should be granted when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false; (b) That without it the jury might have reached a different conclusion; (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

There is no dispute that the second two standards were met. If Mr. Williams had testified at Mr. Sostre's trial as he did in this proceeding, the jury very likely would have reached a different conclusion, and Mr. Sostre, being unrepresented by counsel and unable to make bail, was certainly unable

to meet the testimony, other than by baldly asserting that he had been "framed". It is the first standard which is at issue here.

More than other appeals, then, this one depends upon a close analysis of the record, in the light of the District Court's opinion. For if the inferences drawn by the Court, both from the state trial record, and the evidentiary hearing in the District Court, are not supported by the record, then the recantation is cast in a different light, because of the enormous importance of the witness' testimony to Mr. Sostre's conviction.

The decision of the District Court upon a question of fact may be rejected when it is clearly erroneous, in a habeas corpus proceeding just as in any other proceeding, United States ex rel. Bloeth v. Denno, 313 F.2d 364, 371-372 (2d Cir. in banc, 1963), cert. den. 372 U.S. 978. A finding is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." Ibid, quoting United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948). In making a decision about such a

conclusion, the clearly erroneous rule is applied in a special way to questions of fact when they are based upon documentary evidence, rather than solely upon the demeanor of the witness. As to such evidence, the reviewing court is "in as good a position as the trial court to evalute" it. Iravani Mottaghi v. Barkey Imp. Co., 244 F.2d 238, 248 (2d Circuit, 1957), cert. den. 354 U.S. 939 (1957). As will be discussed more fully below, the conclusions of the hearing court in detecting alleged contradictions and lack of veracity in Arto Williams' testimony are to a large degree based upon documentary evidence, including the transcripts and other documents, rather than upon Mr. Williams' demeanor. Petitioner-appellant contends that the lower court misread that evidence, considered on its face. In such a case, this Court should "have no hesitancy in drawing different inferences and reaching a contrary result." Severi v. Seneca Coal and Iron Corp., 381 F.2d 482 (2d Circuit, 1967). See also, United States v. United States Gypsum Co., supra, at 395-396.

The District Judge chose to find Arto Williams' testimony impeached on a number of grounds. These may be organized into two groups:

(1) Internal contradictions from place to place within the transcript of testimony;

(2) External contradictions, including Williams' alleged fear of retaliation, testimony about his criminal record, and about other activities.

B. Internal Contradictions

The principal group of alleged contradictions concerns Mr. Sostre's transaction with Mr. Williams in which the state claimed that the heroin was passed, and for which Mr. Williams testified in this proceeding that he made it seem as though the heroin had passed. The District Court's analysis of these, set forth at pages 18 and 19 of the opinion, can be understood only by breaking it down into its component parts.

1. Passage of the money.

The relevant passage (Opinion p. 18) begins:

> On each occasion when Williams testified about his transactions with Sostre, he has given a different account. At the trial, Williams said he gave $15.00 to Geraldine Robinson who counted it and passed it to Sostre. This version was confirmed at the trial and

> at the hearing by Trooper Steverson and the other witnesses. At the hearing, Williams testified that only Sostre was in the front of the store and he handed the $15.00 directly to him.

This is a matter of some importance. There is no evidence that the police witnesses literally knew about Mr. Williams' effort to frame Mr. Sostre. It was unlikely, therefore, that at the time of the trial they had all worked out some false story about the person to whom the money passed. If their stories gibed in such details as the identity of the person who actually received the money, then the stories given at the time of the trial take on added credibility.

The trouble is that at the state trial, Mr. Williams did <u>not</u> testify that he gave the money to Mrs. Robinson (MST p. 38); the major premise for this passage in the opinion is an outright mistake. At the trial, Arto Williams said he gave the money to Mr. Sostre, as he did at this hearing. That is the principal point, in fact, in the state trial of Mr. Sostre where there is some contradiction among the witnesses, all of whom testified briefly and without cross-examination.

2. Sostre's Movements.

The opinion continues:

> At trial, Williams stated that after Sostre received the $15.00, Sostre went to the rear of the store, then returned to the front and handed Williams a white glassine envelope. Steverson and the others gave the same account of Sostre's movements, and Steverson observed that a glassine envelope passed from Sostre to Williams. At the hearing, Williams testified that after he gave the money to Sostre, Sostre went to the rear of the store, then returned after a short interval and conversed briefly with Williams.

It is true, of course, that at the trial Mr. Williams said that heroin has passed, and at this proceeding he said it did not; that is what his recantation was all about. The statement that the others gave the same account of Sostre's movements is misleading. Police officers Steinmetz (MST 51-52, T. 164-176) and Wilcox (MST 54-57) said they could see Sostre stand by the counter, and move to the back of the store. Neither one said he could see drugs, or any specific object pass. Their stories, both at the trial and at this proceeding, are fully consistent with Williams' recantation. Only one witness said he could see the glassine envelope

pass; that was Officer Steverson, and his testimony was thoroughly impeached, as will be discussed more fully below.

The opinion continues:

> Not even Sostre supports this testimony, for he said nothing at all about going to the rear of the store after receiving the money from Williams.

This is a curious interpretation of Sostre's testimony. The only relevant passage appears at page 49 of the transcript, as follows:

> Q. Now, when he gave you the money, did you do anything with it, if you recall?
>
> A. I think I put it in the register and gave part of it to Geraldine Robinson because Geraldine had come in to the store in order to get money to operate the other store that was on High Street, so for the weekend like on a Saturday, that is the big day and you have to have not only enough money, but enough records and she usually used to come to the store on Jefferson, which I had two stores....

There is nothing here about going or not going to the back of the store, but since Williams said that Geraldine Robinson was at the back of the store (T. 112-113), the Sostre

testimony is quite consistent.

The passage in the opinion closes:

> Furthermore, if Williams' purpose was only to have Sostre hold the money for him, he gave no explanation of why he remained at the counter after he gave the money to Sostre.

But if Williams' purpose was to frame Mr. Sostre, that was a very good explanation for remaining at the counter.

3. Williams' Movements.

At page 19, reiterating page 13, the opinion states:

> During the hearing, Williams attempted to recant his trial testimony that Sostre passed him a glassine envelope. He gave one version of this recantation on direct and another during his cross-examination. During direct examination, Williams said that after he gave the money to Sostre, he brought his hand back across the counter and then to his shirt pocket. Upon cross-examination, he said that he waited until Sostre returned from the rear of the store before putting his hand to his pocket, and could not recall whether he and Sostre touched hands or not.

It is error to characterize the direct testimony as contradicting the cross-examination. The direct testimony

occurs in two places. The first occurs at pages 34-35:

Q. And what happened after that?

A. And he asked me, he said, "Would you have your friend leave the store," or something like that, and I said, "Sure", and I walked with the detective outside the store. He stood outside and I went back in and then is when I asked Martin to hold the $15 that I had and he took the money and as I brought my hand back across the counter, I went to my shirt pocket.

Again at page 36:

Q. What happened after that, after the transaction with the money, what did you do?

A. I went out and told, -- Oh, after I gave Martin the money he went to the back of the store and I heard him talking to someone who I assumed was Geraldine Robinson at the time and when he came back and we talked for a while and I told him, "I will see you later," and he said, "Be good" and I left the store.

The cross-examination is as follows (pp. 113-114):

Q. He went back and gave Geraldine the money in the back room?

A. That's how I knew she was back there.

Q. All right, and then he came forward again?

A. Yes.

Q. And then what happened?

A. As he approached the counter, approached me, I reached across the counter and dropped my hand back to my shirt pocket.

Q. From where?

A. From where?

Q. Yes. You said you brought your hand back to your shirt pocket. Where had your hand been previously?

A. I had my hand like this.

Q. Where is that, resting on the counter?

A. Yes.

Q. I see. Did Mr. Sostre come close to your hand?

A. All I recall him doing is walking up in front of me.

Q. He walked up in front of you and then you took your hand and put it in your shirt pocket?

A. That's right. [Emphasis added.]

There is no contradiction here.

The opinion continues: (Op. p. 19)

> Sostre testified to a third version of the incident. He stated that he thought he exchanged a slap-handshake with Williams.

This can hardly be called "a third version," because Mr. Sostre asserts one thing, and Mr. Williams says he cannot

"recall" it. (See above).

4. State's Evidence

The opinion goes on to contrast favorably the state's evidence from the police (p. 19-20):

> While there is much in the record to question the credibility of Arto Williams, there is no reason not to believe the testimony of the police officers who were involved. Steverson's testimony that he stood in the open doorway to Sostre's bookstore, that he had a clear and unobstructed view of the Sostre-Williams transaction, and that he saw a small glassine envelope pass from hand to hand was not shaken in any way at the hearing. The testimony of othere officers relating to these events supports Steverson's testimony.

This statement fails to take account of the fact that all the testimony about events in the store, with the exception of one bit, is consistent either with Mr. Williams' story at the state trial or in this habeas corpus proceeding.* Steinmetz and Wilcox were stationed in the window across the street. Trooper Steinmetz did

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* There is conflict about whether Mr. Williams was sitting in the front or the back seat of the car as he drove with the police to Mr. Sostre's store, but his placement makes little difference to the veracity of his story about concealing the drugs.

not represent, either in this habeas corpus hearing or in the previous proceeding, that he was able to see the details of the transactions (T. 170; MST. 52; not called at Geraldine Robinson trial.) John Wilcox, who had the camera with the telephoto lens, and whose testimony is in the state trial records, also did not see anything specific pass between Williams and Sostre (MST. 56; GRT 398). Apart from the passage of the drugs, Mr. Williams' recantation is no different from the state's version. Mr. Williams knows that his actions were intended to convey an impression that drugs passed. Therefore, the testimony of Officers Wilcox and Steinmetz proves nothing one way or the other. Officer Steverson was the only one who said he could see the alleged object pass, and to say that his testimony was "in no way shaken" is astonishing.

His testimony was impeached, first of all, with relation to his ability to see what he claimed to have seen. The doorway of Mr. Sostre's store was set back from the street, with panels slanting in from the building line; all windows were boarded up because of the riot. (T. 215). Officer Steverson had to stand to one side or the other of the door to permit the surveillance team across the street in

the dentist's office to see into the store. (T. 215). He said he stood to the left of the door, and by that statement he ran up against the problem that the counter at which the transaction took place was also on the left side. (T. 215). Being out of the line of vision of the surveillance team also tended to put him out of the line of vision of the transaction. He said he was standing some eighteen feet from Mr. Sostre and Mr. Williams, with Mr. Williams' back to him, and Mr. Sostre facing the door. In this position, and at this distance, Officer Steverson said he saw the glassine packet, about 7/8" by 1 7/8", pass from one hand to another. It is apparent, however, that an observer standing to the left of the door and eighteen feet away would not have a clear view of actions on the left side of the store, no matter how Williams and Sostre faced one another.

Apart from the physical improbability of the description, it is most unlikely, according to Officer Steverson's account, that Sostre would have stood in such a way as to permit him to see the alleged transaction; Sostre had supposedly excluded him from the store only a few minutes before because he did not know him.

All these facts are simply ignored by the Court below,

while an even more conclusive piece of evidence is relegated to a footnote. In the officer's original affidavit, sworn to before Officer Gristmacher on July 19, 1967, three days after the events in Sostre's store, there is no mention of an envelope having passed. The precise language was (Petitioner's Exhibit 5):

> . . . At this time, Sostre walked to the rear of the store, came back out and walk to the counter. He then extended his hand to the informant and the informant extended his hand to meet Sostre's. The informant left the store and joined me in the doorway.

It is not necessary to emphasize that without the actual passing of the glassine envelope, Officer Steverson's testimony amounts to little more than that of Officer Steinmetz and Wilcox, and is consistent with Arto Williams'.

C. External Contradictions

The Court below asserts that there are many reasons why Williams' testimony is unworthy of belief (Opinion p. 15).

1. Fear of Reprisal

The first of these relates to Williams' "fear" of retaliation. An undifferentiated fear apparently existed,

but it is not persuasive that Williams lied at this proceeding. Williams testified that he never received any threats, nor had his parents. All were "worried" back in mid-1969 (T. 79-80), but about nothing specific; his letter to the probation officer confirms this (Exhibit J to Cream Affidavit). In any event, that was four years ago, and there is no evidence of such fears in recent years.

At the time of his recantation, in 1971, Williams had already twice told the perjured version at Martin Sostre's and Geraldine Robinson's trials; he was thousands of miles from the imprisoned Petitioner and was, in effect, lost and inaccessible to him. Mr. Williams nevertheless continued to feel guilt about his testimony, and finally volunteered his story in group therapy, through a process the account of which rings true (T. 37-38, 81-82). He opened an issue which was already long closed and himself volunteered to initiate a contact with Judge Motley (T. 39). He said that his current sentence for violating probation in California might have been shortened if he had stayed there and not come here to testify (T. 117, 134). Immediately prior to his testimony here he had been told several times by his own attorney (T. 22-24) that "he could be prosecuted for what he is saying here today," and he heard from an

Assistant District Attorney that he is threatened with a perjury prosecution in New York State (T. 162).

In sum, this is a case in which the witness chose to recant when he was at liberty, and not in jail, and thereafter adhered to his recantation in and out of prison for the following two years. Mr. Sostre was in prison and without resources, and if Mr. Williams were impelled by a motive to avoid some improbable revenge, the simplest course was for him to remain in California, and not volunteer his recantation.

2. Criminal Record

The Court below pointed to alleged falsehoods in Mr. Williams' account of his criminal record (Opinion, p. 16-17), and relied heavily upon them to question his credibility:

> He was arrested in September 1972 and again in December 1972, in California, on heroin felony charges. In early 1973, he pled to a misdemeanor drug count. His less than candid attitude with this court was exhibited during cross-examination about these events when he insisted that he had not been arrested for a felony charge in California after the execution of the affidavit, and tried to explain away the arrest by insisting that it was for the sale of baby aspirin.

These allegations are based upon the records introduced by the State after the evidentiary hearing (See affidavits of Douglas S. Cream and Paul G. Chevigny). Those records either do not support or outright refute the court's conclusions.

The question about the felony arrest appears in the transcript at p. 86, as follows:

> Q. I am referring to the date, Your Honor, which the witness testified to as being April of 1971. I am establishing as a matter of fact that after that affidavit was written he was arrested on felony charges in the State of California.
>
> A. That is incorrect.
>
> Q. What is incorrect.
>
> A. I was not arrested after. It was before, a year before.

This question and answer follows immediately after the following exchange, beginning on the previous page:

> Q. Mr. Williams, as a matter of fact, weren't you convicted of the crime for which you were returned to prison as a violation of probation subsequent to your decision to recant your testimony?
>
> A. I don't know all what you are saying right at the present time, but I know you have the dates wrong.

Q. Well, I have the dates from you, Mr. Williams. Do you want to go back and think about them again?

A. At the time I made that statement I was free.

Q. You were free?

A. I had no, --anything pending over me.

Q. Okay, and then subsequent to your decision you were then arrested, isn't that right?

A. Subsequent to my decision?

Q. After your decision, after your affidavit.

A. Oh, last December, that's when I was arrested. [i.e., December of 1972]

In other words, the question about the "felony charge" is put in the context of questions about the underlying arrest resulting in probation for the violation of which Mr. Williams was returned to prison. Mr. Williams quite obviously assumed that the question on page 86 was asked in the context of that underlying arrest, because he made no secret of the fact that he had been arrested in December of 1972; he said so right on page 86. Therefore, he was not denying the occurrence of a felony arrest after he had first recanted in 1971; he was denying that the arrest for the underlying conviction occurred after the recantation.

And he was telling the truth, because the underlying charge was brought in 1969 (Exhibits A and B to Cream affidavit of 7/18/73).

The Court goes on with the litany of Mr. Williams' alleged "less than candid attitude," saying that Mr. Williams "tried to explain away the arrest [after the affidavit was executed in 1971] by insisting that it was for the sale of baby aspirin" (Opinion, p. 17, see above p. 32).

This statement is simply inaccurate. Mr. Williams did not say that he was arrested in 1972, after the affidavit of recantation, for the sale of baby aspirin. He said that he initially received probation for that offense before the recantation. The record is perfectly clear (T. 84):

> Q. I see, and what were you on probation for?
>
> A. Sale of dangerous drugs.
>
> Q. I beg your pardon?
>
> A. I guess you can call it sale of dangerous drugs, baby aspirin.
>
> Q. Baby aspirin, I see. It is a crime in California to sell baby aspirin?
>
> A. As a drug, yes.
>
> Q. And when were you convicted of this crime, Mr. Williams?

A. In '69 or '70, somewhere around there.

Q. It couldn't have been '71?

A. Conviction or arrest?

Q. Conviction.

A. It could have been. I wouldn't swear on it.

The records produced by the Attorney General after the hearing substantiate Mr. Williams' testimony; the felony complaint for the 1969 arrest in California (Exhibit B to Cream Affidavit) states that Arto Williams:

> did willfully, unlawfully, and feloniously agree, consent and offer to sell a restricted drug, to wit, lysergic acid diethylamide, and then did sell, deliver, and furnish a substance in lieu thereof. (Emphasis added).

It is worth noting that these documents were first produced after the hearing, when Mr. Williams had been sent back to California, he did not have the benefit of them to refresh his recollection. Therefore, so far from impeaching his testimony, the record shows that Mr. Williams was doing his best to recall the facts, in response to questions which was rather vague in its reference to a "felony charge," as well as with respect to the baby aspirin, and that he recalled them ore accurately, apparently, than even the Attorney

General or the District Court.

It is submitted that the alleged motives of Arto Williams to lie at the habeas corpus proceeding are few, and the supposed proof of his "less than candid attitude" actually tends to corroborate his testimony.

3. Motives to Lie at State Trial

On the other hand, the motives impelling Arto Williams to obtain evidence and testify against Mr. Sostre at the original trial were extremely strong. It is established that Mr. Williams had a felony record at the time he was in jail in 1967 (T. 26), and that he was a potential second felony offender upon the charge for which he was in jail. He received probation of one year, after the Sostre trial was completed (T. 37; Chevigny affidavit of July 23, 1973, ¶9(b), and Erie County Indictment No. 33781 with endorsements). In the face of this salient fact, the District Court states (Opinion p. 20):

> There is no testimony at all that anyone made any promises whatever to Mr. Williams.

Furthermore, it is not disputed that Mr. Williams was released from jail upon the pending charge of grand larceny

later embodied in the above indictment on July 14, 1967, the very day he appeared in Mr. Sostre's store. The District Court suggested doubt about this, saying (Opinion, p. 10):

> On the next day, July 14, Williams claims he was released on his own recognizance, and brought to Police Headquarters where he met Officer Gristmacher.

Williams' testimony on the point (T. 30-32) was not refuted or even questioned; nothing was introduced to cast doubt upon it at the hearing. If there was evidence to show that Mr. Williams was not released from jail on his own recognizance upon that felony charge on or about July 14, 1967, that evidence was within the control of the State, and was easy to adduce; an Assistant District Attorney attended the habeas corpus proceedings in this matter with the Assistant Attorney General. The Attorney General even made a motion to introduce evidence after the hearing was completed, offering a second opportunity to impeach Mr. Williams on this point, as well as upon Mr. Williams' testimony about the lenient treatment he received at his sentence, yet no record or other evidence relating to actions against Mr. Williams in the New York

Courts was introduced on that matter. It must be taken as proven that Williams was released from jail the day he went to Sostre's store, and that he later received no prison time for his crimes, following his testimony at Mr. Sostre's state trial.*

Mr. Williams' account that the Buffalo police sought to blame Martin Sostre for the riot, and were willing to use almost any means to get a conviction, is supported by Williams' letter of September 13, 1970 and by the public record. (See stenographic record of testimony of Frank Felicetta, Hearings before the Committee on Un-American Activities of the House of Representatives, 90th Congress, 2d Session, Part V [Buffalo] pp. 2017, et seq.). It is apparent that the Buffalo police were very proud of their arrest of Mr. Sostre, related it at length

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* One conclusive proof on this point was in the trial of Geraldine Robinson, Mr. Sostre's co-defendant, whose trial was severed. The record of that trial, which was before the District Court, contains proof from the mouth of Alvin Gristmacher himself that Mr. Williams was in jail from June 20 to July 14, 1967, and was released on the latter date (Geraldine Robinson Trial Transcript, Erie Co. Indictment No. 33508A, p. 188-199).

before the Congressional Committee, and sought to account for the Buffalo riot through the medium of Mr. Sostre. Arto Williams was correct in his estimate that the Buffalo police would pay almost any price for a conviction of Sostre. They needed a scapegoat for the riot, and Sostre was ready at hand.

The District Court also implied doubt about Mr. Williams' testimony about his possession of the means to frame Mr. Sostre: the heroin. The opinion states (p. 10-11):

> Gristmacher gave Williams some money and arranged to meet him at about 9:00 p.m. that evening. According to Williams, he left, bought some heroin, used one-half of it, and kept the rest. He also claimed that he obtained additional drugs from other individuals on the street and was still high when he met with Officer Gristmacher that evening.

This is a most important point, for if Mr. Williams in fact did buy heroin earlier in the day on July 14, 1967, he could easily have had some to give to Officer Gristmacher and to attribute to Mr. Sostre. Mr. Williams' testimony on the matter (T. 32, 92) was not refuted by any witness, although police witnesses such as Officer Gristmacher were available to the state. The reason for the omission is

suggested by the transcript of the trial of Geraldine Robinson, in which Officer Gristmacher swore that when he saw Arto Williams on July 14, 1967, at about 9:30 p.m., Mr. Williams must have been "high" (GRT 113-122).

In summary, the opinion below questions the veracity of the witness Arto Williams in a number of ways which are either not supported or are refuted by the transcript and other documents. These include alleged inconsistencies between the state trial record and the hearing record, between direct and cross-examination of Mr. Williams, and between Mr. Sostre and Mr. Williams, bearing on almost all the material facts: the person to whom Mr. Williams gave the money, the way he moved his hands, and the actions of Mr. Sostre in his store. By contrast, the alleged support in the record for the police version is simply not present.

The external circumstances which are alleged to show Mr. Williams' lack of candor, especially the records of his past crimes, upon careful reading actually corroborate his story. The strong motives for Mr. Williams to have lied at the state trial, not refuted or even contested by the State, are ignored or in some cases denied by the court below.

In a case such as this, this Court is presented with

facts which it is "in as good a position as the trial court to evaluate". Iravani Mottaghi v. Barkey Imp. Co., supra, and it is submitted that the examination of those facts must leave this Court with "the definite and firm conviction that a mistake has been made."

Point II. PERJURY BY A MAJOR WITNESS IN A STATE COURT CONVICTION IS A GROUND FOR GRANTING A WRIT OF HABEAS CORPUS

The Respondents maintained in the court below that the writ could not be issued in this case because the prosecution had no knowledge of the perjury of Arto Williams; the District Court did not reach the point.

Passing for the moment the question whether the knowledge of Williams, an agent of the State, must be imputed to the State (discussed under Point IV below), Federal Courts have issued the writ of habeas corpus in cases of great injustice such as the present one without regard to government participation. In Jones v. Commonwealth of Kentucky, 97 F.2d 335 (6th Cir. 1938), cited with approval in Napue v. Illinois, 360 U.S. 264 (1959), the petitioner, having been condemned to death for murder, claimed that his conviction was based on perjured testimony, and the state's Attorney General agreed, but the state courts declined to afford relief. Citing Mooney v. Holohan, 294 U.S. 103 (1935), the Court of Appeals said:

> If it be urged that the concept thus formulated but condemns convictions obtained by the state

> through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney case embraces no more than the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective remedy for the alleged wrong if constitutional rights are not to be impaired. 97 F.2d at 338.

This case is similar. Here there is an enormously long sentence, resulting from a conviction at which the Petitioner was not represented by counsel. Mr. Sostre has been in prison for many years, and the state was uable to afford a remedy because of its lack of the power of interstate process. In accord with Jones are United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382, 389 (N.D. Ill. 1949)(also cited with approval in Napue v. Illinois supra, 360 U.S. at 269) and Sharpe v. Commonwealth of Kentucky, 135 F.2d 975 (6th Cir. 1943). Napue itself gives support to the position by saying:

> The same result [reversal under the Fourteenth Amendment] obtains when the State,

> although not soliciting false evidence, allows it to go uncorrected when it appears. 360 U.S. at 269.

Judge Warren F. Ferguson, in Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969) has explained the position that the use of false evidence may become a denial of due process of law if the state can afford no remedy:

> It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the perjury, and, absent such a remedy, federal habeas relief will be granted. There, the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, Smith v. Warden, Maryland Penitentiary, 254 F. Supp. 805 (D. Md. 1966); United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382, 390 (N.D. Ill. 1949).
>
> The position that a criminal conviction founded in part upon perjured testimony cannot be con-

> stitutionally permitted to stand, whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by that state's ignorance. Nor can it seriously be contended that there is absent any 'state action' necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction. Id. at 804-805.

It is submitted that this position is consistent with Napue v. Illinois, supra. At least in the case where a major injustice is done by continued incarceration, and the recantation cannot be remedied under state law, the writ should issue.

Point III. STANDARDS DEVELOPED IN THIS CIRCUIT REQUIRE THAT THE WRIT BE ISSUED

Over a period of years, this Circuit and Courts within this Circuit have considered the problems attendant upon administration of applic ations for writs of habeas corpus based upon newly discovered evidence and, in particular, upon recantations of perjured evidence. This Court's position is consistent with the view taken in the line of cases represented by Jones v. Commonwealth of Kentucky, supra: the writ must issue in cases of recantation when a major injustice may be done by the failure to issue it, regardless of the participation of the prosecution. For the sake of clarity, this development will be considered first in relation to writs and motions in federal cases, and then in relation to 28 U.S.C. §2254.

Kyle v. United States, 297 F.2d 507 (2d Cir. 1961) was a habeas corpus case where documents arguably helpful to the defense which had been turned over to the government were missing at the time of trial, but later turned up in government files. In granting a hearing to determine the materiability of the evidence and the facts surrounding its disappearance, the

Circuit Court discussed the strength of the proof required from the Petitioner. For cases of newly discovered evidence in general, the petitioner had to assemble such evidence as "would probably" produce a different result at a trial. In cases of recantation, following the language in Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), it was necessary to show only that the result "might" have been different. 297 F.2d at 512. The distinction, it seems, lies in the fact that evidence recanted may so easily have a deeper effect than some other bit of newly discovered evidence which may only be cumulative. Finally, where it is proven that the prosecution has actually suppressed evidence, it is enough for reversal if the withheld evidence is merely relevant to the defense. Id. at 512. See also, United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968).

The standards were reviewed in United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969). The "might have been different" standard of Larrison v. United States, supra, was held applicable to cases of recantationsof perjured testimony where the government had been involved in suppressing evidence. United States v. Polisi. 416 F.2d 573, 577 (2d Cir. 1969), reiterated that the

"would probably have been different" standard was to be applied to newly discovered evidence in general, while the "might have been different" standard was to be applied to recantations and deliberately suppressed evidence:

> Where the non-disclosure is passive, i.e., not deliberate in the above senses, the courts have sometimes modified the criteria for a new trial, and instead looked to the defendant's harm, i.e. prejudice. The earlier decisions of this court have reasoned that where what is at stake is not deterrence of conduct detrimental to the integrity of the judicial system, the strong policy underlying the desired finality of judgments comes into play and requires a substantially higher probability that disclosure of the evidence to the defense would have altered the result. Id. at 577.

The Court adopted a somewhat simpler formulation in United States v. De Sapio, 435 F.2d 272 (2d Cir. 1970). In its footnote 14 at page 286, the Court said:

> The Government points out in brief that Larrison dealt with a situation where a principal prosecution witness had made an affidavit (later repudiated) that he had given false testimony at the instance of the Post Office inspectors. This would account for the departure from the Berry test, which

> the opinion did not mention. In fact the Larrison court denied a new trial. We are inclined to agree that the less severe Larrison test should be confined to cases of prosecutorial misconduct.

Accord, United States ex rel. Rice v. Vincent, 491 F.2d 1326 1331 (2d Cir. 1974).

The "special rule" of Larrison relating especially to recantations, that a new trial should be granted where "without [the testimony] the jury might have reached a different conclusion" is still consistent with De Sapio, at least in a case where the perjurious evidence is of great importance. See, e.g., United States v. Persico, 339 F. Supp. 1077, 1088 (E.D.N.Y. 1972), aff'd. 467 F.2d 485 (2d Cir. 1972).

The Kyle line of cases, as we may call those relating to Federal convictions discussed in previous paragraphs, established several points:

(a) Similar standards are applied to writs of habeas corpus and applications for a new trial and there is no hard and fast rule requiring government participation in the suppression of evidence as a predicate for granting relief;

(b) The Court looks to a balance between prejudice to the defendant at one end of the scale and government misconduct on the other, in affording a basically just proceeding to the defendant;

(c) A defendant may be put to a higher standard of proof where there is little or no government participation, but he will not be excluded from relief, especially in cases of recantations of perjured testimony, which may be of especial importance.

It remains to consider the applicability of these standards to a writ of habeas corpus from a state court conviction. The standards of Kyle, supra were perhaps first applied to a habeas corpus for a state prisoner in Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962), cited with approval in United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964). There, Judge Palmieri applied a sliding-scale standard similar to the one derived above from the Kyle line of acses, between prejudice to the defendant on the one hand and deception by the prosecution on the other:

> In Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), not directly applicable

> because the Court there was concerned with a federal prisoner, Judge Friendly quoted the view of the editors of the Columbia note, . . . that the rule is that knowing use of perjured testimony requires reversal even though prejudice is not affirmatively shown, whereas prejudice is the central matter of inquiry in the area of passive non-disclosures. The Court concluded that the "required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play." 208 F. Supp. at 888.

United States ex rel. Fein v. Deegan, 410 F.2d 13 (2d Cir. 1969) applied the standards of the federal cases directly to a state prosecution, arguing that where the evidence is concealed "passively" without active participation by the state, a stronger showing of materiality may be required of the petitioner. 410 F. 2d at 19-20. Precedents relating both to federal and state convictionswere cited with equal authority.

It is submitted that a careful review of the precedents from collateral attacks on federal and state convictions reveals that the rule urged by the respondents, requiring "knowing use" by the prosecution of perjured testimony, is in fact not the prevailing rule. If a great deal of injury is done the petitioner by his continued detention, as, for example,

where he is serving a long sentence, if the testimony is of great importance, if "the party...was taken by surprise when the false testimony was given and was unable to meet it" (Larrison, supra, 24 F.2d at 88, emphasis added) and if the state affords no forum to grant relief, then federal habeas corpus is available. All of these ingredients are present in this case. It is shocking to leave the Petitioner to serve his long sentence, the testimony of Arto Williams is indispensable to his conviction, the Petitioner could is no way meet the false testimony because he was without counsel, and the state courts were unable to give Petitioner's application a full hearing, because those courts could not produce Arto Williams to testify. Against these considerations, respondents can maintain, at most, under some precedents, that without some prosecution participation, Petitioner has a higher standard of proving materiality; he must prove the result "would probably" have been different, not merely that it "might have." In this case, these distinctions are of little significance, because there can be little doubt that if Arto Williams were to give his present testimony before a jury in state court, the

result of Mr. Sostre's case not only "might be" and "would probably be," but would be different.

As a matter of law, however, Petitioner contends that the lowest standard is applicable to his case, first, because his petition is based on the recantation of perjured testimony for which the "might" standard applies (Larrison, supra; United States v. Miller, supra; United States ex rel. Rice v. Vincent, supra). More important, the lowest standard is applicable because there was in fact participation by the state in the false testimony of Arto Williams, within the meaning of the law. That is our next point.

Point IV. "KNOWING USE" HAS BEEN DEMONSTRATED

The knowledge of Arto Williams, as an agent of the State, was knowledge of the State within the meaning of the "knowing use" rule. Cases which have granted relief because of the "knowing use" of false testimony, or the suppression of evidence, have not required knowledge on the part of the prosecuting attorney himself. Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964) cited with approval in United States ex rel. Fein v. Deegan, supra; Curran v. State of Deleware, 259 F.2d 707 (3d Cir. 1958); Imbler v. Craven, 298 F. Supp. 795, 806 (C.D. Cal. 1969); Nash v. Purdy, 283 F. Supp. 837, 841 (S.D. Fla. 1968); Evans v. Kropp, 254 F. Supp. 218, 220 (E.D. Mich. 1966); People v. Robertson, 12 N.Y.2d 335, 239 N.Y.S.2d 673 (1963). The standard set forth in Evans v. Kropp, supra, where the court granted relief because a psychiatrist had determined that the defendant was insane, and prison guards knew of his finding, is:

> I...agree with Barbee that the state is accountable for all information which comes within the knowledge of its agents while prosecuting a criminal matter. 254 F. Supp. at 222.

See also, Giglio v. United States, 405 U.S. 150, 154 (1972) where a promise of immunity made to a witness by an Assistant United States Attorney, and not disclosed to the defendant, was held to deny due process of law even when the attorney was not authorized to make the promise, and it was repudiated by his superiors; cited with approval in United States ex rel. Rice v. Vincent, supra, at 1332.

Arto Williams testified in this proceeding, and in each of the state court trials, that he was employed by the Buffalo police as an informant. He was paid in release from jail, in money, and in favorable treatment on his own cases. The rule set forth in Evans v. Kropp, supra, and in Giglio v. United States, supra, makes the state responsible for the acts of its agent Arto Williams.

It has never been the law that the prosecution may escape responsibility for the acts of its agents in criminal cases, merely because they are paid informers rather than policemen. In the law of confessions, Massiah v. United States, 377 U.S. 201 (1964) reversed a conviction because an admission was made, after indictment and in violation of the Sixth Amendment, to a secret informant (not a full-time public official). See also,

Beatty v. United States, 389 U.S. 45 (1967)(per curiam) reversing 377 F.2d 181 (5th Cir. 1967). Cf. People v. Leyra, 302 N.Y. 353, 363 (1951)(confession taken under hypnosis by doctor called by District Attorney).

In the administration of the defense of entrapment, the responsibility for the acts of agents falls upon the government. The leading case, Sherman v. United States, 356 U.S. 369 (1958) was itself a case of entrapment by an informant. The issue of when a person becomes an agent for purposes of the defense is discussed in Johnson v. United States, 317 F.2d 127 (D.C.Cir. 1963), similar on its face to our case, where an officer gave money to a private person, apparently acting as his agent, for the purpose of buying drugs. Unlike the present case, in Johnson the agent did buy drugs, and the issue of entrapment was raised. The Court said:

> The entrapment defense does not extend to inducement by a private citizen; yet it has been found general application to cases where the officer acts through a private citizen.... 317 F.2d at 128.

The Court drew the distinction, Ibid at footnote 1, that the government could escape resonsibility only "where the questioned

activity had first been found or promoted by the third person before the officials became involved."

The foregoing are general rules of government responsibility for the acts of its agents. There are particularly strong reasons in this case why the knowledge of Arto Williams should be held to be knowledge of the government:

(a) Arto Williams was employed before his contact with Mr. Sostre as an informer, and continued as one afterward;

(b) Arto Williams was encouraged to believe that he had to make a buy from Sostre in particular; that the police were out to "get" Sostre. Cf. Williamson v. United States, 311 F.2d 441 (5th Cir. 1962);

(c) Arto Williams was offered (and given) substantial rewards for carrying out the desires of the police;

(d) A police officer gave Arto Williams money earlier in the day, and in fact knew Williams to be "high" during the evening, thus incurring the risk of the planting of drugs.

(e) Arto Williams solicited the contact, as an agent, and Mr. Sostre did not seek him out.

The policy behind the cases which impute the actions of agents to the state is that the state may not escape res-

ponsibility for violating the rights of defendants merely by employing unreliable informants rather than police officers. That policy operates strongly here, where the police set a net of circumstances which tended to encourage Arto Williams to get a conviction at all costs.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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State of New York)
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WAYNE S. BRAVEMAN, being duly sworn, deposes and says:

1. I am over eighteen years of age, am not a party to this action, and reside at 58 West 58th Street, New York, New York.

2. On the 6th day of August, 1974, I served copies of the within Petitioner-Appellant's Brief upon Louis J. Lefkowitz, Esq., Attorney General, and Douglas Cream, Esq., Assistant Attorney General, attorneys for the respondents-appellees in this action, at Two World Trade Center, New York, New York, and State Building, 65 Court Street, Buffalo, New York, respectively, the addresses designated by said attorneys for such purpose, by depositing true copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Wayne S. Braveman

WAYNE S. BRAVEMAN

Sworn to before me this
6th day of August, 1974.

Alan H. Levine

NOTARY PUBLIC

ALAN H. LEVINE, ESQ.
NOTARY PUBLIC, State of New York
No. 31-2327215
Qualified in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK. COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

.....

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES EX REL. MARTIN SOSTRE,

Petitioner-Appellant,

-against-

FRANK M. FESTA, et al.,

Respondents-Appellees.

AFFIDAVIT OF SERVICE

Paul G. Chevigny

Attorney for Petitioner-Appellant

Office and Post Office Address, Telephone

84 Fifth Avenue
New York, New York 924-7800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for